IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-787

MONSANTO COMPANY,

Petitioner,

vs.

DAWSON CHEMICAL COMPANY AND CRYSTAL CHEMICAL COMPANY,

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Petitioner's Reply to Respondents' Brief in Opposition to Petition for Writ of Certiorari	1
1. The Need Continues for Review of the Collateral Estoppel Issue on Writ of Certiorari	2
2. The Petition Is Not Premature	4
3. The Writ Should Be Granted if Only for the Merit of Restraining Unwise Extension of the Principles of Blonder-Tongue	6
Conclusion	7

Table of Authorities.

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U. S. 313 (1971) 2, 4, 5, 6, 7

Monsanto Company v. Rohm & Haas Company, Appeal No. 19,132 (Opinion of January 12, 1972) 1, 2, 3

35 U. S. C. § 102 ..... 3, 5

35 U. S. C. § 103 ..... 2, 3, 5, 6

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Respondents appended to their opposing brief a copy of the January 12, 1972 opinion of the Court of Appeals for the Third Circuit in *Monsanto Company* v. *Rohm & Haas Company*. Each of the respondents' three arguments for denying the petition for writ of certiorari are, we believe, undermined rather than supported by the Third Circuit decision.

Respondents characterize that Third Circuit decision as one "agreeing that the patent at issue is invalid." But it is plain from that decision—which expressly refrained from reaching any issue other than misrepresentation to the Patent Office—that petitioner has not yet had its one full and fair opportunity for judicial resolution assured by

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U. S. 313 (1971).

The Court of Appeals for the Third Circuit affirmed the district court judgment that a deliberate misrepresentation had been made to the Patent Office to overcome a rejection of obviousness under 35 U. S. C. § 103 without even attempting to determine what was material to the Patent Office's withdrawal of an obviousness rejection under Section 103. Nor did it undertake to determine the issue of obviousness under Section 103 or under the other validity issues before it. That matter is still before the Third Circuit Court of Appeals in a Petition for Rehearing and a copy of that Petition for Rehearing is appended to this brief as part of the factual record.

Whether or not the issues before the Third Circuit Court of Appeals may yet result at some later date in a petition for writ of certiorari by one of the parties there, the fact and nature of the decision of the Court of Appeals of the Third Circuit is relevant itself. If the pending petition for rehearing should result in the requested reconsideration and an adoption of Judge Kalodner's strong dissent as the majority view, the decision of the Fifth Circuit, from which the present petition arises, should become—at least as a practical matter—moot. If the Third Circuit should adhere to its decision, Monsanto will promptly petition this Court for a Writ of Certiorari in that case. The two matters in such event would surely deserve to be considered as a single controversy by this court of last resort.

1. The Need Continues for Review of the Collateral Estoppel Issue on Writ of Certiorari.

This Court would hardly have undertaken in *Blonder-Tongue* to pass over the substantive patent validity issues presented to it for review and to create a limited collateral

estoppel rule had it assumed its new rule would be used to prevent a patentee from obtaining his one full and fair hearing on the merits of the patent validity issues. But that is what has occurred here.

Neither of the diametrically opposed district court judgments on the statutory issues of validity, under Sections 102 and 103 of Title 35, has received appellate review. The Third Circuit, to which the Fifth Circuit deferred, did not even reach the issue of whether under § 103 Monsanto was fully entitled to its patent. If that determination were made and accorded with that of the district court in Houston—the holding of misrepresentation by the Third Circuit would necessarily relate to a matter thereby acknowledged as being immaterial to issue of patentability. If a patent can in fact be held invalid for misrepresentation of an immaterial fact, then surely there must at least be clear and convincing proof of intent to mislead. But as the district judge in Philadelphia acknowledged, he applied a preponderance of the evidence test in determining the alleged deceit. Judge Kalodner's accurate criticism of the trial court's and the Third Circuit majority's misapprehension of the law on this point deserves this Court's attention.

The same factors which make re-determination of patent invalidity issues unpopular because they are difficult and time-consuming make any patent validity determination no more popular in either the trial courts or the courts of appeal. If a court can avoid scheduling a patent infringement action for trial until some other court has held the patent invalid, its work is greatly simplified. So long as the patent has been previously held valid in all preceding trials, a court must hear the new defendant's same invalidity defense. It is always to that court's advantage, in terms of saving its own time and effort, to permit itself to be persuaded by a party to postpone scheduling trial in favor of actions involving the same patent pending in other

courts. This is not to say that some years later that the same court may not exercise its sense of justice and equity to hold the patentee should not be stopped.

But if any court is moved by its sense of justice and equity to schedule a patent trial despite a trial scheduled elsewhere, or to make the effort to decide the validity issues despite the fact that decision on the validity issues is pending in another court, is there any reason contemplated in *Blonder-Tongue* which suggests its judgment should go for naught? Why shouldn't the trial court be encouraged, or at least not discouraged, from proceeding earlier rather than later if that is what its sense of justice and equity prompts it to do? The time to prevent the denial of justice because of delay, for example, is before even further delay has occurred. As a policy matter affecting future litigants, the question presented should be answered *no*.

Respondents point to a lack of any concern in the different courts in applying *Blonder-Tongue* retroactively and to the absence of any showing that the trial courts are troubled by delay in scheduling patent infringement trials. But that only underscores the popularity of the choice that reduces the time in disposing of cases. It is all too short a step from avoiding expenditure of judicial time on patents once held invalid to postponing patent trials until some other court has found the patent invalid. The cases since *Blonder-Tongue* illustrate that *Blonder-Tongue* as applied is an insufficiently complete guide for balancing, in a case-by-case development, all aspects of the public interest involved. *Blonder-Tongue* was designed to serve justice and should not be misused to pre-empt it.

2. The Petition Is Not Premature.

Respondents' argument that the petition that is "premature" is really an argument that procedural issues ("The Court of Appeals . . . merely remanded the case to

the District Court for trial of the collateral estoppel defense") are not important. This Court, of course, spoke in *Blonder-Tongue* to the important interplay of judicial procedure and the Congressional purpose expressed by the patent statutes. Procedure *is* of the essence. Having to successively enforce a patent against different infringers in the different courts where they can be reached and repeatedly rebutting the same defense of invalidity in each case until some court rules the patent invalid is a costly and debilitating process to the patentee. It is *not* premature to determine whether a defendant, tried for infringement on a patent not previously held invalid, shall have more than one day in court because of an intervening decision by another court. An affirmative answer to the question presented would grant the defendant that inordinately special privilege.

Respondents' suggestion that petitioner first pursue the present matter on remand to a final adjudication, whatever that may mean in the present context, so that petitioner can then additionally present to this Court whatever other questions may have arisen, suggests a direct appeal availability respondents elsewhere disparage. Monsanto would, of course, be only too happy to have this Court resolve all the issues presented by the different resolutions of patent validity in different federal courts, or to hold this petition pending further developments rather than deny it.

There is, however, a real and present problem in the adjustment of court procedure to more fairly and expeditiously balance the various segments of the public interest represented by enforcement of a patent right in different federal courts. The decisions of the Courts of Appeal for the Third and Fifth Circuits plainly illustrate the difficulties of obtaining a review of the fundamental issues of validity under 35 U. S. C. §§ 102 and 103 despite diametrically opposite determinations on these issues below.

The different decisions of the Philadelphia and Houston district courts illustrate the varying standards by which the patent law is applied. Since it would seem no court is interested, for example, in fully reviewing either a decision of validity or invalidity of a patent for a chemical compound under 35 U. S. C. § 103, why shouldn't the judgment of validity by the Houston district court stand?

3. The Writ Should Be Granted if Only for the Merit of Restraining Unwise Extension of the Principles of Blonder-Tongue.

Petitioner acknowledges the ease with which its arguments for reviewing the question presented seemingly turn into arguments that *Blonder-Tongue* creates more problems than it corrects. But that is because seemingly slight departures from *Blonder-Tongue* can easily have major and irreversible results, and because adherence to the supposed letter of *Blonder-Tongue* can quite ignore its total area of concern. Petitioner argues from a conviction that resources of patentees as well as of defendants can be better applied than to enduring expense and delay by litigation. Petitioner also argues from a very deeply held conviction that encouragement of decisions of invalidity at the expense of no less correct judgments of validity may discourage the investment of resources in research and development responsible for technological innovation.

Why, then, should one of two contemporaneous decisions resulting from contemporaneous trials be thrown away because it happens to be entered after, rather than before, the other and because it happened to be a judgment of validity and the other a judgment of invalidity?

A "no" answer to the question presented will encourage courts to take the initiative in scheduling trials and reaching decisions when they believe the interests of justice

require their proceeding promptly. This assumes, as it must, that courts so acting will have no predisposition to favor the causes of plaintiff-patentees on the one hand or declaratory judgment plaintiffs on the other. It does not need to assume that the occasion will arise often for a court to feel it useful to proceed to trial or judgment while an earlier trial or earlier tried case on the same patent is pending. So long as the courts are not inhibited from so acting by concern that their efforts will be undone by happenstance of an artificial rule, the beneficial effect will be there when it is needed. The "no" answer sought can do no harm and would act as a safety valve in the application of *Blonder-Tongue*. And like a safety valve, it is important and of great benefit because it if there when it is needed, whether it is needed often or not.

CONCLUSION

Since there is an important reason for the petition for writ of certiorari, since it is not premature and since it has merits the petition should be granted.

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In the

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vs.

ROHM & HAAS COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Pennsylvania.
Honorable THOMAS A. MASTERSON, *Trial Judge.*

PETITION FOR REHEARING.

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INDEX

PAGE

Petition for Rehearing A1

I. The Dissenting Opinion Is Correct A2

II. The Misrepresentation Conclusion Is Constructed on Errors and Misunderstandings A3

Nowhere Did Plaintiff Say That 3,4-DCPA Was the "Only" 3,4-Dichloroanilide Having Herbicidal Activity A3

The "Inconsistency" Exists Only by Misunderstanding What Was Said A4

Husted's Affidavit Was Not Untruthful or Misleading as to 3,4-DCPA's Effectiveness A5

Other Points Misapprehended by the Majority A6

1. "Moreover, priority of invention in an interference proceeding involving this patent and those parties have now been resolved in favor of the appellee." (Footnote 6, Opinion, p. 5) A6

2. "The Patent Office, in four separate office actions, rejected all of Huffman's claims [in the 1957 application] as unpatentable under prior art disclosures." (Opinion, p. 6) A7

3. "In all, the [Husted] affidavit showed less than 25 percent of Husted's results; of 810 tests, only 150 were submitted." (Opinion, p. 7) A7

4. "Moreover, it cannot be convincingly argued that the examiner in the Patent Office in 1967, in a proceeding numbered 3,382,280, can be charged with knowledge of the contents of an abandoned application numbered 661,575 made in 1957." (Opinion, p. 12) A8

5. "We hold that under the 'totality of circumstances' (1) the rejection for obviousness in 1957 of the class of compounds of which 3,4-DCPA was a member . . . (2) the similar rejection in 1961 for the same reasons . . ." (Opinion, p. 13) A9

III. Reconsideration Is Unusually Important Here .. A10

Table of Authorities.

Blonder-Tongue Laboratories, Inc. v. Univ. of Illinois Foundation, 402 U. S. 313 (1974) A10

Chris-Craft Industries, Inc. v. Monsanto Company, Civil Action No. 68-315 WPG (C. D. Calif.) A9

Deutsche Gold und Silber-S. v. Commissioner of Patents, 254 F. Supp. 624 (D. D. C. 1966, aff'd, 397 F. 2d 656 (D. C. Cir. 1968) A2

In re Henze, 181 F. 2d 196 (CCPA, 1950) A2

In re Papesch, 315 F. 2d 381 (CCPA, 1963) A2

In re Stemniski, 444 F. 2d 581 (CCPA, 1971) A3

35 U. S. C. § 103 ..... A1, A2, A6

Manual of Patent Examining Procedure, § 201.06 ..... A5

Manual of Patent Examining Procedure, § 707.05 ..... A9

Manual of Patent Examining Procedure, § 708 ..... A9

A1

In the

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ROHM & HAAS COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Pennsylvania.
Honorable THOMAS N. MASTERSON, *Trial Judge.*

PETITION FOR REHEARING

Plaintiff-appellant Monsanto Company respectfully requests this Court to reconsider its decision of January 12, 1972, in which, without reaching the other issues (including that under 35 U. S. C. § 103), the Court affirmed the district court judgment that Monsanto, by deliberate misrepresentations to the Patent Office, had overcome a rejection of obviousness under § 103.

With all due respect, it must be said that the Court in deciding that misrepresentation was proved by clear and convincing evidence without attempting to determine

what is material to a determination of unobviousness under § 103 and without even considering whether the Examiner would have reached a different result with *all* the Husted tests before her has condemned the plaintiff out of hand.

I. The Dissenting Opinion Is Correct.

The defendant's total failure to meet its burden of proof has been lost in a prejudicial misunderstanding of the facts. The dissenting opinion is correct and to the point. The majority has dismissed the telling criticisms in the dissent in a most superficial manner.*

There is not the slightest evidence that the Patent Office was misled or that the patent should not have been granted. And every reasonable doubt has been resolved against the plaintiff as to a supposed intention to mislead.

The district court reached an erroneous holding of intentional deceit but went on to conclude that an intent to deceive is unnecessary when there is evidence of "deliberate" omission of "material" information. Unfortunately its notions of materiality were based upon an erroneous reading of the patent law** and a semantic twisting of "deliberate." (App. 780) This Court has failed to even look beneath the surface of the lower court's determination of misrepresentation to see if the alleged deceit had any material bearing on the patentability issue.

* Footnote 11 of the majority opinion notes that the District Court had said (in its Conclusion of Law No. 6) that it applied the "clear and convincing" formula. But that was as to invalidity, in general. The test of significance here is what it actually did on the misrepresentation issue.

** The trial court erred in applying a pre-§ 103 case *In re Howe*, 181 F. 2d 196 (CCPA 1950), long discredited and since explicitly overruled as to the rationale upon which the Court below relied by *In re Stemniski*, 444 F. 2d 581 (CCPA, 1971). The trial court also erred in refusing to follow the very cases to which this Court has referred: *In re Papesch*, 315 F. 2d 381 (CCPA, 1963) and *Deutsche Gold und Silber-S v. Com'r of Patents*, 251 F. Supp. 624 (D. D. C. 1966), *aff'd*, 397 F. 2d 656 (D. C. Cir. 1968).

II. The Misrepresentation Conclusion Is Constructed on Errors and Misunderstandings.

Clearly underlying the majority's decision are three closely related items of supposed evidence of plaintiff's deceit. First, is the alleged "inconsistency" between the first two Huffman applications and the third which prompted the Court to highlight the presumably offending passage from the patent in suit at the outset of the opinion. *Second*, is the misconception that plaintiff—in the third Huffman application—asserted, contrary to representations in the first two applications, that "only" 3, 4-DCPA had herbicidal activity. And *third*, is the absence in the Husted affidavit of the data on the effect of 3, 4-DCAA on pigweed. If the Court will acknowledge as it reads this that these items are, indeed, what influenced its decision and will resist any tendency to brush over the following arguments because they appear in a rarely-granted petition for rehearing, we promise in the next few lines to show that the Court has reached a terribly unjust result on the basis of two wholly erroneous beliefs (engendered, of course, by defendant's arguments) and a misunderstanding of the patent soliciting process in the Patent Office.

Nowhere Did Plaintiff Say That 3, 4-DCPA Was the "Only" 3, 4-Dichloroanilide Having Herbicidal Activity.

The Court plainly reached its determination of misrepresentation believing that plaintiff's attorneys had shifted from a position in the first two applications, that a group or class of 3, 4-dichloroanilides shared a previously unknown and surprising herbicidal efficiency, to saying—in the third application—that 3, 4-DCPA was the "only"* compound of the class having such activity.

* Opinion page 6. Defendant's proposed finding 50 was the source of the erroneous language in Finding of Fact 35 (App. 678-679) that the 1967 application "asserted that *only* 3, 4-DCPA

The Court has relied on this apparently critical "fact" without realizing that plaintiff never said or implied it. 3, 4-DCPA *is* the best—by far—but not the only one. And no one connected with plaintiff ever said so. It should be apparent from the fact plaintiff was simultaneously prosecuting both the second and third applications and that the second (which was referred to on the very first page of the third) clearly disclosed and claimed herbicidal efficiency for the *class*, that precisely the opposite was true.

The "Inconsistency" Exists Only by Misunderstanding What Was Said.

The Court indicts plaintiff for being inconsistent in making the two, almost identical statements to the Patent Office which appear on the facing page. The statement on the left refers to the *class*** of "present compounds" which Huffman discovered had surprising herbicidal efficiency as compared to "related compounds" which his tests showed had "little or no herbicidal efficiency." Examples of 13 very closely related*** anilides which, it is undisputed, have "little or no herbicidal efficiency" are then given.

had 'unusual and valuable herbicidal activity'". The trial court did *not* accept the next sentence of the same proposed finding for which the first sentence was the obviously intended prop, namely that "Monsanto adopted a position inconsistent with its position in the first two applications . . .". The mischief was done, however, when the unfairly loaded phrase was left to invite the very finding of inconsistency which the court below rejected.

** 3, 4-dichloroanilides having less than nine carbon atoms in the anilide group. (DX-2 at 710). That class includes both 3, 4-DCPA and 3,4-DCAA.

*** The term "related compounds" as used in the paragraph appearing in the three Huffman applications refers to very similar compounds (i.e. anilides) which were *not* members of the class but which include a homolog (3, 4-DCLA [3, 4-dichlorolauranilide]) and the very isomer (2, 4-DCPA) relied on by the Examiner.

Huffman's Second Application* (DX-2; at 719) [Emphasis Added]	Huffman's Third Application (DX-1; at 649) [Emphasis Added]
"The herbicidal efficiency of the present compounds is surprising, for related compounds possess little or no herbicidal efficiency. When tested as described above, aqueous emulsions of a random group of such compounds are found to possess little or no herbicidal activity. Some of the compounds tested are set forth below:"	"The herbicidal efficiency of 3, 4-DCPA is suprising, for related compounds possess little or no herbicidal efficiency. When tested as described above, aqueous emulsions of a random group of such related compounds are found to possess little or no herbicidal activity. Some of the compounds are set forth below:"
3′-chloroisobutyranilide	3′-chloroisobutyranilide
3′-chloroacetanilide	3′-chloroacetanilide
4′-bromo-2′-phenylacetanilide	4′-bromo-2′-phenylacetanilide
2′,4-dichloropropioanilide	2′,4-dichloropropioanilide
2′,4′-dichloroisobutyranilide	2′,4′-dichloroisobutyranilide
2′, 4′, 5′-trichloroisobutyranilide	2′, 4′, 5′-trichloroisobutyranilide
3′,4′-dichlorolauranilide	3′,4′-dichlorolauranilide
2′,4′-dimethylpropionanilide	2′,4′-dimethylpropionanilide
N-methylacetanilide	N-methylacetanilide
N-n-butylacetanilide	N-n-butylacetanilide
p-chloracetylacetanilide	p-chloracetylacetanilide
2′,4′-dimethylpropionanilide	2′,4′-dimethylpropionanilide
2-chloro-2′,4′-dimethylpropionanilide	2-chloro-2′,4′-dimethylpropionanilide

* The exact same passage also appears in Huffman's first application (DX-3; at 806).

The statement on the right is completely consistent with the first because 3, 4-DCPA is a member of the *class* of compounds which was the subject of the first two applications. Pursuant to Patent Office requirements* the 1967 divisional application followed the disclosure and phraseology of the earlier application from which it was carved and as of whose date it speaks. (App. 698-699) It properly ascribes to the only member (3, 4-DCPA of the class represented by the divisional case the same property relative to the same "related compounds" as to the class itself. The parallel being drawn in each application was between Huffman's inventions and the closely "related", but non-herbicidal, anilides, 3, 4-DCAA had no place in the latter group.

Husted's Affidavit Was Not Untruthful or Misleading as to 3, 4-DCPA's Effectiveness.

When the 1967 Huffman application was filed, the Patent Office had already before it in the first two Huffman applications his discovery that 3, 4-DCPA was one of a class of compounds (including 3, 4-DCAA), which had herbicidal properties. It had been told in each of the first two applications (DX-3; at 805; DX-2; at 718) that 3, 4-DCAA killed pigweed. What it may not have appreciated prior to the filing of 1967 application was the head-and-shoulders superiority of 3, 4-DCPA. The affidavit (DX-1; at 691) accurately confirmed (trial court opinion; App. 691) that 3, 4-DCPA had novel and unexpected herbicidal properties.

* Section 201.06 of the Manual of Patent Examining Procedure specifies in part: "The divisional application should set forth only that portion of the earlier disclosure which is germane to the invention as claimed in the divisional application. . . . While a divisional application may depart from the phraseology used in the parent case, there may be no departure therefrom in substance . . . that would amount to 'new matter' if introduced by amendment into the parent case . . .".

The 1967 patent application itself reported tests on 31 plant species with 3, 4-DCPA. But by reporting the Husted tests on 11 species in direct comparison with the 9 closest compounds, the ruly remarkable qualities of 3, 4-DCPA were thrown into sharp focus. Under these circumstances and in the light of such data the fact that 3, 4-DCAA could kill pigweed or that lesser application rates led to less significant results were not material in any sense to the issue under § 103. Herbicides like medicines must, of course, be used in a sufficient dosage to be effective. And there was nothing the Examiner could or would have done with the "missing" data. The reference to the earlier applications, containing the explicit showing of 3, 4-DCAA's herbicidal effect on pigweed, appeared under a prominent subtitle on the first page of the 1967 application (DX-1; at 643) and was explicitly reiterated in the Huffman affidavit (DX-1; at 667) *which Mr. Cole gave to the examiner along with the Husted affidavit.*

Other Points Misapprehended by the Majority.

Without elaboration we outline below a number of additional points on which the majority has clearly misapprehended either the law or the facts. There are enough of them to place in serious question the Court's comprehension of other relevant facts on which the Court may not have so revealed its misunderstandings.

1. **"Moreover, priority of invention in an interference proceeding involving this patent and these parties have now been resolved in favor of the appellee." (Footnote 6, Opinion, p. 5)**

Where did this egregious error come from? The second (1961) Monsanto application, not the patent in suit, was (and still is) involved in the interference. The interference involved a process claim. It also is under appeal. The

Patent Office has not decided for this Court any of the issues before it.

2. **"The Patent Office, in four separate office actions, rejected all of Huffman's claims [in the 1957 application] as unpatentable under prior art disclosures." (Opinion, p. 6)**

The 1957 application file reveals that the Examiner there in fact found some of the claims allowable (DX-3; at 845). Again, the statement (Opinion, p. 6) that "[a]nd again the Patent Office rejected the claim of the [1961] application . . ." ignores the fact that the Patent Office considered a claim patentable to Monsanto in order to put its 1961 application into interference. These facts should make no difference one way or another, but the Court emphasized as significant "Huffman's previously unsuccessful attempts to obtain a patent" (Opinion, p. 11). That an applicant ultimately succeeds does not make his conduct suspect any more than reversal of a trial court renders the appeal suspect. And in view of the Court's reference (Opinion, p. 14) to ". . . a public interest that cancelled or rejected claims not be revived or restored", it should be noted that the Patent Office did not examine a claim to the compound 3, 4-DCPA until such a claim was submitted in the third (1967) application. The plaintiff is apparently presumed to have succeeded by stealth because it succeeded and to have acted against the public interest because it did not accede to the Examiner's initial and only rejection of the claim to 3, 4-DCPA (DX-1; at 661).

3. **"In all, the [Husted] affidavit showed less than 25 percent of Husted's results; of 810 tests, only 150 were submitted." (Opinion, p. 7)**

Where the Court got its tests-run vs. tests-submitted statistics* is as much a mystery as is its undiscriminating

* Instead of a total of "810 tests" of which "only 150 were submitted" there is in fact a total of 899 tests in Dr. Husted's report (DX-22) of which 110 were included in the affidavit.

attachment of significance to them in the first place. But the critical point is that the data not submitted underscores —rather than detracts from—the nonobvious herbicidal properties of 3, 4-DCPA on which the affidavit focused.

Of the 789 test results appearing in the Husted report but not in the affidavit, 669 of those show a herbicidal rating of "0" ("No phytotoxicity"*), 66 show a rating of "1" ("Slight phytotoxicity") and 27 show a rating of "2" ("Moderate phytotoxicity")—*a total of 762 (about 97%) in which the results clearly showed little or no herbicidal activity.* There were only 35 tests in the entire Husted report showing a rating of "3" ("Severe phytotoxicity"), or "4" ("Dead"). Of those, 31 involve 3, 4-DCPA and the other four involved 3, 4-DCAA. So there were only four tests out of 899 in which a compound other than 3, 4-DCPA showed even near herbicidal activity. Less than half of one percent! And those four were obtained with 3, 4-DCAA—the only other compound in the tests which was part of the *class* disclosed in the first two applications and a compound *whose herbicidal activity was discovered by Dr. Huffman.*

4. **"Moreover, it cannot be convincingly argued that the examiner in the Patent Office in 1967, in a proceeding numbered 3,382,280, can be charged with knowledge of the contents of an abandoned application numbered 661,575 made in 1957." (Opinion, p. 12)**

This startling statement—in rejection of plaintiff's contention that it could hardly be said to have been hiding the ability of 3, 4-DCAA to kill pigweed—goes out of its way to be wrong. No proceeding numbered 3,382,280 was before the Examiner. That was the later assigned patent number of the 1967 application 613,738. The controlling fact is that

* The Court's Footnote No. 5 correctly defines a herbicide as something that is capable of *destroying* a plant. "Phytotoxic" means poisonous or toxic to plants. And as is clear from the Husted ratings of "0" to "4" some compounds show some toxicity to some plants, at practical application rates, but are not herbicidal.

the first page of the 1967 application before her contained prominent cross references to the 1957 and 1961 applications (DX-1; at 643). They thus became working documents and part of the record which Examiner Trusof was duty-bound to review. There is no reason whatever from facts on this record or anywhere else to conclude she did not do her duty.* She was charged with knowledge of the previous applications, she in fact had knowledge of them,** and she was also aware of the interference proceedings (which involved the second application).

5. **"We hold that under the 'totality of circumstances'—(1) the rejection for obviousness in 1957 of the class of compounds of which 3, 4-DCPA was a member . . . (2) the similar rejection in 1961 for the same reasons . . ." (Opinion, (p. 13).**

The "class of compounds of which 3, 4-DCPA was a member" was *never* claimed—in any of the three Huffman applications. The first two applications were directed to the *use* of the class of compounds (or certain species, including 3, 4-DCPA) as herbicides. Plaintiff knew very well it could not claim the class as new compounds—because the class contained prior art compounds, e.g., 3, 4-DCAA—and it never attempted to do so. If the elements of the "totality of circumstances" were not understood, how could the plaintiff have been fairly judged?

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* The Manual of Patent Examining Procedure requires the Examiner to refer to the parent applications of the patent being examined. Section 708 states in part "Examiners are responsible for making this determination [that the disclosure of the earlier case adequately supports claims of the later case]." Section 707.05 specifies in part "In all continuing applications, the parent applications should be reviewed for pertinent prior art."

** In another case involving this patent, *Chris-Craft Industries, Inc.* v. *Monsanto Company*, Civil Action 68-815-WPG, District Court for the Central District of California, Examiner Trusof was deposed on January 26, 1970 by the declaratory judgment plaintiff and asked if she had looked at the two prior files. Lest any further mystery be made of usual Patent Office procedure, it may be noted that she testified flatly that she had.

III. Reconsideration Is Unusually Important Here.

On the very day this appeal was argued, the Supreme Court handed down its opinion in *Blonder-Tongue Laboratories, Inc.* v. *Univ. of Illinois Foundation*, 402 U. S. 313 (1971). Under that ruling the first judgment of invalidity of a patent gives rise to an estoppel defense in subsequent actions against other defendants, making it particularly important that the first judgment on patent validity issues be full, fair, and impartial. As noted in Footnote 4 of the opinion, the Fifth Circuit Court of Appeals, in view of the fact of Judge Masterson's opinion below and without consideration of its merits, has reversed and remanded the judgment of the Houston District Court, speaking through Judge Singleton, that the Huffman patent is valid. Who is going to accept the responsibility of reviewing Judge Masterson's conclusion on patent invalidity? Surely the Supreme Court expected more than this under *Blonder-Tongue* on the patentability issues. Other parties looking to this opinion for guidance need more than they have received. Judge Kalodner's strong dissent and Judge Singleton's decision at 312 F. Supp. 452 underscore that there are, indeed, "honest and fairminded men" who would not condemn the plaintiff on the evidence in this case.

A hearing on all the issues on appeal is again respectfully requested.

Respectfully submitted,

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